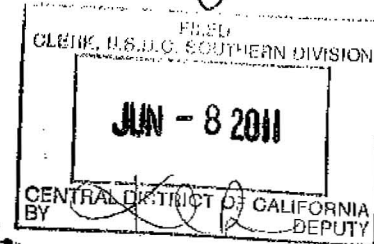


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4 I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY
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11 DATED: Jan 8, 2011
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 DWIGHT GRANDBERRY,
12
13 vs. Petitioner,
14 B.M. CASH, Warden,
15
16 Respondent.

Case No. CV 11-3798-MMM (RNB)

ORDER SUMMARILY DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS FOR LACK OF SUBJECT
MATTER JURISDICTION

17 On May 11, 2011, petitioner filed a Petition for Writ of Habeas Corpus by a
18 Person in State Custody herein.

19 The Petition purports to be directed to petitioner's 1994 conviction in Los
20 Angeles Superior Court for carjacking, for which petitioner received a 31-year
21 sentence. The sole claim alleged in the Petition is an instructional error claim.

22 This is at least the twelfth habeas petition filed by petitioner in this Court
23 directed to his 1994 conviction and/or sentence. The first four petitions were each
24 dismissed without prejudice for failure to exhaust state remedies. The fifth petition,
25 filed in Case No. CV 99-06270-WDK (RNB), was dismissed with prejudice on
26 October 14, 1999, for being time barred. While petitioner purported to file a notice
27 of appeal from the Judgment in Case No. CV 99-06270-WDK (RNB), his requests
28 for a certificate of appealability ("COA") were denied in turn by the District Court

1 and the Ninth Circuit. Further, on June 20, 2001, the Ninth Circuit denied
2 petitioner's application to file a second or successive petition.

3 The Petition now pending is governed by the provisions of the Antiterrorism
4 and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110 Stat. 1214) ("the
5 Act"), which became effective April 24, 1996. Section 106 of the Act amended 28
6 U.S.C. § 2244(b) to read, in pertinent part, as follows:

7 (1) *A claim presented in a second or successive habeas corpus*
8 *application under section 2254 that was presented in a prior*
9 *application shall be dismissed.*

10 (2) *A claim presented in a second or successive habeas corpus*
11 *application under section 2254 that was not presented in a prior*
12 *application shall be dismissed unless—*

13 (A) *the applicant shows that the claim relies on a new*
14 *rule of constitutional law, made retroactive to cases on collateral*
15 *review by the Supreme Court, that was previously unavailable; or*

16 (B)(i) *the factual predicate for the claim could not have*
17 *been discovered previously through the exercise of due diligence;*
18 *and*

19 (ii) *the facts underlying the claim, if proven and viewed*
20 *in light of the evidence as a whole, would be sufficient to*
21 *establish by clear and convincing evidence that, but for*
22 *constitutional error, no reasonable factfinder would have found*
23 *the applicant guilty of the underlying offense.*

24 (3) (A) *Before a second or successive application permitted*
25 *by this section is filed in the district court, the applicant shall*
26 *move in the appropriate court of appeals for an order authorizing*
27 *the district court to consider the application.*

28 ...

1 (C) *The court of appeals may authorize the filing of a*
2 *second or successive application only if it determines that the*
3 *application makes a prima facie showing that the application*
4 *satisfies the requirements of this subsection.*

5 ...

6 (4) *A district court shall dismiss any claim presented in a*
7 *second or successive application that the court of appeals has*
8 *authorized to be filed unless the applicant shows that the claim satisfies*
9 *the requirements of this section.*

10
11 The Petition now pending constitutes a second and/or successive petition
12 challenging the same judgment of conviction as petitioner's prior habeas petition in
13 Case No. CV 99-06270-WDK (RNB), within the meaning of 28 U.S.C. § 2244(b).
14 See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding that dismissal
15 of a habeas petition as time barred under 28 U.S.C. § 2244(d)(1) constitutes a
16 disposition on the merits and renders a subsequent petition second or successive for
17 purposes of 28 U.S.C. § 2244(b)). Thus, to the extent that petitioner is now
18 purporting to raise an instructional error claim that he previously raised in Case No.
19 CV 99-06270-WDK (RNB), § 2244(b)(1) precludes the Court from considering it.

20 To the extent that petitioner is now purporting to raise an instructional error
21 claim that he did not previously raise in Case No. CV 99-06270-WDK (RNB), it was
22 incumbent on him under § 2244(b)(3)(A) to secure an order from the Ninth Circuit
23 authorizing the District Court to consider his new claim, prior to his filing of the
24 instant Petition in the District Court. See Cooper v. Calderon, 274 F.3d 1270, 1274
25 (9th Cir. 2001), cert. denied, 538 U.S. 984 (2003). Such permission will be granted
26 only if "the application makes a prima facie showing that the application satisfies the
27 requirements of [Section 2244(b)]." See id. Only after the Circuit has made the
28 initial determination that the petitioner has made a prima facie showing under §

1 2244(b)(2) does the district court have any authority to consider whether the
2 petitioner has, in fact, met the statutory requirements of § 2244(b). Under §
3 2244(b)(4), the petitioner must make "more than another prima facie showing" in the
4 district court; the "district court must conduct a thorough review of all allegations and
5 evidence presented by the prisoner to determine whether the [petition] meets the
6 statutory requirements for the filing of a second or successive petition." See United
7 States v. Villa-Gonzalez, 208 F.3d 1160, 1164-65 (9th Cir. 2000). While it does not
8 appear to the Court that petitioner can make the requisite showing under § 2244(b)(2)
9 with respect to his instructional error claim, that is a determination for the Ninth
10 Circuit to make in the first instance. If petitioner's instructional error claim
11 constitutes a new claim, his failure to secure an order from the Ninth Circuit
12 authorizing the District Court to consider it, prior to his filing of the Petition in this
13 Court, deprives the Court of subject matter jurisdiction. See Cooper, 274 F.3d at
14 1274.

15 For the foregoing reasons, IT IS ORDERED that this action be summarily
16 dismissed, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the
17 United States District Courts.

18 LET JUDGMENT BE ENTERED ACCORDINGLY.

19
20 DATED: May 31, 2011

21
22 
23 MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

24 Presented by:

25 
26 Robert N. Block
27 United States Magistrate Judge
28